No. 223

In the Supreme Court of the United States

October Term, 1941

INTERSTATE COMMERCE COMMISSION AND THE PACIFIC ELECTRIC RAILWAY COMPANY, APPELLANTS

v.

RAILWAY LABOR EXECUTIVES ASSOCIATION AND BROTHERHOOD OF RAILROAD TRAINMEN, APPELLEES

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT, INTERSTATE COMMERCE COMMISSION

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OPINIONS BELOW

The opinion of the District Court (R. 59) is reported in 38 F. Supp. 818. The report of the Commission (R. 25–42) is published in 242 I. C. C. 9.

JURISDICTION

The final decree of the District Court was entered on April 2, 1941 (R. 68). Petition for appeal

was filed May 20, 1941 (R. 69), and was allowed the same day (R. 72).[1] Probable jurisdiction was noted on October 13, 1941. Jurisdiction is conferred by section 5 of the Commerce Court Act, c. 309, 36 Stat. 539, 543, 28 U. S. C., section 45a; section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938, par. (4), 28 U. S. C., section 345, and the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219–221, 28 U. S. C., sections 45, 47a.

STATUTES INVOLVED

Pertinent provisions of the statute are set forth in Appendix A, *infra*, pp. 64–75.

QUESTIONS PRESENTED

Where the Commission finds that to continue operation of portions of a line of railway would impose an undue burden upon the carrier and upon interstate commerce (R. 41) and permits abandonment thereof, does the statute confer upon it, contrary to its uninterrupted and consistent determinations, with which Congress has not seen fit

[1] The statutory defendant, the United States, joined in the appeal (R. 70), but on November 24, 1941, upon the motion of the Solicitor General, its appeal was dismissed. The right of the other appellants to proceed is settled by the decision of this Court in *Interstate Commerce Commission v. Oregon-Washington Railroad & Navigation Company*, 288 U. S. 14, where the pertinent statutory authority is reviewed (pp. 23–27).

to interfere, authority to impose upon the carrier conditions[2] for the protection of labor whose interests may be affected by the abandonment?

Was the lower court right in holding that resort to the legislative history of S. 2009 (Transportation Act, 1940) "is unnecessary" (R. 65) in passing upon this question, contrary to our contention that such history shows Congress had the question before it and declined to confer the authority sought?

A number of cases[3] involving the same question are dependent upon the decision herein.

STATEMENT

On November 13, 1939, the Pacific Electric Railway Company, a wholly owned subsidiary of the Southern Pacific Company, but the operations of which are conducted separately (R. 26), applied for permission to abandon lines or parts of lines of railroad aggregating 96.58 miles, all in Los Angeles, Orange, and Riverside Counties, Calif. (R. 25). "This application is the result of

[2] The conditions sought appear as Exhibit A to the complaint (R. 7–9).

[3] These cases are: Finance Docket No. 12791, *Southern Pac. Co. et al. Abandonment;* F. D. No. 12792, *Interurban Electric Ry. Co. Abandonment of Operation;* F. D. No. 13239, *Sacramento Northern Ry. Abandonment of Operation* 247 I. C. C. 157, 158, F. D. No. 12829, *Denver & Rio Grande Western R. Co. Trustees Abandonment*, 247 I. C. C. 381; F. D. No. 12548, *Yazoo & M. V. R. Co. Abandonment*, 244 I. C. C. 163; and F. D. No. 13379, *Roscoe, Snyder & Pac. Ry. Co. Abandonment*, decided November 25, 1941.

a general program of rearrangement of the applicant's passenger service, involving abandonment of certain rail lines and substitution of motor-coach transportation as a means of increasing operating revenues, reducing expenses, and rendering a more adequate service to the public" (R. 26). The Governor and the Railroad Commission of California were notified, and the State Commission appeared at the hearing (R. 26). Appellees, representing employee members or their organizations, participated in the proceedings. They were "the only protestants showing active opposition to the granting of the application" (R. 38) but "no witnesses appeared in their behalf" (R. 38). Some time after the conclusion of the hearing, an examiner's proposed report was issued, recommending the granting of the application in part (R. 9), and on August 28, 1940, Division 4 approved the abandonment of some segments of the line and dismissed the application as to others (R. 25), finding that "to continue operations of the lines herein permitted to be abandoned would impose an undue burden upon the applicant and upon interstate commerce" (R. 41). The Commission adhered to its many prior decisions that it had no authority to impose conditions for protection of the employees in a case such as this (R. 41).

Following the decision of Division 4, appellees petitioned the entire Commission for rehearing and reconsideration, which was denied (R. 6).

This suit was filed November 8, 1940, attacking as erroneous the Commission's holding that it had no authority in an abandonment case to impose the conditions suggested (R. 5). Apart from this claimed error, no attack is made upon the certificate permitting the abandonment or upon the holding that continued operations of the line would impose an undue burden upon the applicant and upon interstate commerce (R. 41); nor was any question raised concerning the adequacy of the hearing or the sufficiency of the evidence.[1]

After submission on final hearing, on March 6, 1941, the lower court held (R. 59) that section 1 (20) conferred upon the Commission a discretionary authority in abandonment cases to impose conditions for the protection of displaced employees (R. 67). This conclusion was based upon the decision in *United States* v. *Lowden*, 308 U. S. 225, affirming a Commission order attaching conditions for the protection of labor in consolidation cases, under another section of the act. The lower court further held that the legislative history of S. 2009 (the Transportation Act of 1940), "can throw little light on the extent of the discretionary authority since 1920 to impose condi-

[1] The evidence before the Commission is not before the Court. It is settled by repeated decisions of which *Mississippi Valley Barge Co.* v. *United States*, 292 U. S. 282, 286, is typical, "that the findings of the Commission may not be assailed upon appeal in the absence of the evidence upon which they were made."

tions under section 1 (20)" (R. 65) and that the interpretation of that paragraph is "so clear that resort to such extraneous matters is unnecessary" (R. 65). Our contention that this legislative history showed that the question of affording protection to labor in abandonment cases was called to the attention of Congress, and Congress specifically refrained from giving the Commission such authority, was overruled (R. 66). The Commission's consistent rulings that, under the provisions of section 1 (18–20), enacted in 1920 and unmodified, so far as here material, by the 1940 Act, it has no authority in abandonment cases to impose conditions for the protection of employees, were given no weight.

Appellants' assignment of errors attack these holdings (R. 70–71).

SUMMARY OF ARGUMENT

I. As an agency of the Congress, the Commission is not to construe "public convenience and necessity" as conferring unlimited power. (*Radio Comm.* v. *Nelson Bros.*, 289 U. S. 266, 285). But it should exhaust all means to determine what authority Congress did or did not confer by the words "such terms and conditions as in its judgment the public convenience and necessity may require." If the legislative history shows, as we think it does, that Congress has not given the Commission power to impose conditions for the benefit of labor in abandonment cases, it is unnecessary to go further.

In the Senate hearings on S. 2009 (Transportation Act of 1940), in response to the statement of a witness that if the Commission is to consider the interests of labor in consolidation cases, "they should consider it where there is an abandonment of facilities," the Chairman of the Committee remarked: "In the interests of labor itself, we cannot go so far as to say to them 'If you are going to abandon a line of a railroad, the Interstate Commerce Commission has got to keep these men working.'" This is a mere excerpt of a very extensive legislative history both in the Senate and in the House, showing that Congress considered the question and declined to confer the sought authority upon the Commission. Whether such Congressional action was desirable or undesirable, wise or unwise, is not a matter of concern either to the Commission or to the Court.

II. During the entire period that the abandonment provisions of the Act have been in effect (since 1920), no case can be cited under those provisions wherein the Commission exercised the authority here invoked. Apparently for the first 14 years following the enactment of the Transportation Act of 1920, it was not asked to do so. Its first discussion of the question was in *Chicago Great Western Ry. Co. Trackage*, 207 I. C. C. 315, decided May 14, 1935, and its construction of its powers therein has been consistently followed. The Act has been rewritten in many particulars

since that decision, which had been called to the attention of Congress, without any expression of disapproval of the conclusion. This long-continued administrative construction will not be disturbed except for cogent reasons, which do not exist in this case.

The Commission exercises only those powers which are delegated to it by Congress. It is invested with no roving commission, and if Congress had intended to give to the Commission "unfettered capacity" in a case of this kind it would have done so by plainer language than is contained in the Act.

III. The decision of this Court sustaining the Commission's order in *United States* v. *Lowden*, 308 U. S. 225, is not controlling. There the Court was construing other provisions of the Act, containing different language, and was affirming an interpretation placed upon indefinite words by the Commission. Referring to the legislative history of S. 2009 and to a voluntary agreement entered into between most of the rail carriers of the United States and the rail unions, protecting labor in consolidation cases, the court sustained the Commission's action. Here the Court is asked to reach a conclusion different from that of the administrative tribunal, contrary and not in harmony with the legislative history of S. 2009, and beyond the terms of any agreement between management and labor involv-

ing relations with employees. Employees who may be laid off by the railroads because of reduced operations would not be entitled to the protection that employees on abandoned branches would have were the Commission's interpretation upset. Congress has already provided for the protection of dismissed railroad employees under the Railroad Unemployment Insurance Act, effective June 25, 1938, 45 U. S. C. A. section 351 et seq. If further protection is needed, it must be secured either by additional legislation or collective bargaining.

ARGUMENT

I

Where Congress has shown by its own action that it has not conferred certain authority upon the Commission, such determination, with the wisdom of which the administrative tribunal has no concern, is governing upon it and upon the courts

Section 1 (18) [5] of the Interstate Commerce Act provides that "no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad or the operation thereof, unless and until there shall first have been obtained from

[5] Set out in its entirety in Appendix A, pp. 65–68, *infra*. Both paragraphs (18) and (20) of section 1 were added by the Transportation Act of 1920, the purpose of which, as this Court has stated on many occasions, was to insure to the people of the United States an adequate system of transportation. *Wisconsin R. R. Comm.* v. *C., B. & Q. R. R. Co.*, 257 U. S. 563; *New England Divisions Case*, 261 U. S. 184, 190; *Texas & Pac. Ry. Co.* v. *Gulf, C. & S. Fe Ry. Co.*, 270 U. S. 266, 277.

the Commission a certificate that the present or future public convenience and necessity permit of such abandonment," and section 1 (20) [5] authorizes the Commission "to attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require." It is this last paragraph of broad general scope which appellees contend confers the authority sought on the Commission. Acting under the provisions of these paragraphs, the Commission between 1920 and October 31, 1941, the date of its last annual report to Congress, granted 1,696 applications to abandon, involving 27,722 miles of road,[6] and in no case has it considered it had authority to impose conditions such as here sought.

It will be obvious that "such terms and conditions as in its [the Commission's] judgment the public convenience and necessity may require" is language so general in nature that some interpretation is necessary. "While one may not end with the words of a disputed statute, one certainly begins there." *Trade Commission* v. *Bunte Bros.*, 312 U. S. 349. We believe it logical to first discuss the question of Congressional authority conferred upon the Commission, because if we can show that Congress, after considering the matter, declined to confer the sought authority, there is

[5] See footnote on page 9.

[6] The details will be found in Appendix B, p. 75, *infra*.

no need to apply extraneous interpretative principles. We are not unmindful of course of this Court's opinion in the *Lowden Case, supra,* where the Court construed language involving other provisions of the act, and by the application of well-recognized canons of construction, affirmed the Commission's assumption of authority in consolidation cases. We discuss that case later (pp. 56–60).

As stated, the abandonment provisions were added to the Interstate Commerce Act by the Transportation Act of 1920, and our research into the legislative history of that Act confirms the statement of the lower court herein (R. 64–65) that "there is nothing in the 1920 Act itself or in its legislative history which indicates that Congress had in mind either in the case of consolidation or of abandonment the protection of displaced employees."[7]

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[7] Mr. Esch, Wisconsin, Chairman of the House Committee on Interstate and Foreign Commerce, in presenting the Esch-Cummins Bill to the House (which resulted in the Transportation Act of 1920) did say: "There is no power now to restrain abandonment under Federal law. Railroads in many States can do as they will. We provide that there shall be some Federal control over the matter of abandonment, so that cities and villages that have been built up on these lines can be given due consideration by the regulatory body before the order of abandonment is issued. We give such control to the Commission to investigate the situation to determine the facts." (Cong. Rec., November 11, 1919, Vol. 58, pp. 8309–8318.)

For some time following the depression beginning in 1929, the condition of the railroads had evoked concern. At the end of 1936 there were 91 roads of all classes in the hands of receivers and trustees, operating 69,712 miles of road, about one-third of the mileage in the country.[8] Early in 1938, the President appointed three members of the Commission, referred to as the Committee of Three, to bring in recommendations "relating to this serious situation,"[9] and these recommendations are set forth in a Message from the President.[10] On September 20, 1938, the President appointed a Committee of Six, equally divided between management and labor,[11] "to consider the transportation problem, and recommend legisla-

[8] House Document No. 583, 75th Congress, 3d Session, pp. 33, 48.

[9] House Document No. 583, 75th Congress, 3d Session, p. 1.

[10] House Document No. 583, 75th Congress, 3d Session, pp. 1–3.

[11] The Committee of Six was composed of Mr. M. W. Clement, President, Pennsylvania Railroad; Mr. E. E. Norris, President, Southern Railway; Mr. C. R. Gray, Vice Chairman, Union Pacific Railroad; Mr. George M. Harrison, Grand President of the Brotherhood of Railway and Steamship Clerks and chairman of the Railway Labor Executives Association; Mr. B. M. Jewell, President of the Railway Employees Department of the American Federation of Labor, and Mr. D. B. Robertson, President, Brotherhood of Locomotive Firemen and Enginemen (Hearings on Transportation Act of 1939, Senate, pp. 4–5).

tion."[12] Insofar as of significance here was their recommendation with respect to consolidations that there be "protection of the public interest and a fair and equitable arrangement to protect the interest of employees affected."[13]

Senate proceedings.—On March 30, 1939, Senators Wheeler and Truman introduced a bill, known as S. 2009, concerning which Senator Wheeler stated (Cong. Rec., Vol. 84, part. 6, p. 6136, 76th Congress, 1st Session):

> We did take the recommendations of the Committee of Six, and we used them as a basis for much that is contained in the pending bill, * * *.

Section 37 of S. 2009 incorporated the abandonment paragraphs of the 1920 act, without change, including authority to attach to the certificate terms and conditions related to public convenience and necessity. This language was not particularized. On the other hand, in section 49 (3) (b) covering unifications, consolidations, etc., it was provided that "In passing upon any proposed transaction under the provisions of this section, the Commission shall give weight to the following considerations, among others, (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) the effect

[12] Report of Committee to the President, dated December 23, 1938, p. 1.

[13] Page 5 of report referred to in footnote 12.

upon the public interest of the inclusion, or failure to include, weak railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected." The detail of the matters to be considered in consolidation cases, compared with the general language in the abandonment section, is noteworthy. If Congress proposed to confer the same authority in abandonment cases, it would have used the same language. In the next subparagraph of S. 2009, section 49 (3) (c), it was provided, among other things: "The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions *of this section,* a fair and equitable arrangement to protect the interests of the employees affected."[14] [Italics added.]

Hearings commenced before the Senate Committee on April 3, 1939, and on that day Mr. Harrison, a representative of labor on the Committee of Six and chairman of the Railway Labor Executives Association, appellee here, testified and stated that if it became necessary or desirable to have unifications or consolidations, with resulting displacement of men, a reasonable adjustment

[14] The similarity of this language with the recommendation of the Committee of Six concerning consolidations will appear from the report of that Committee to the President dated December 23, 1938, page 32.

such as labor now had with management,[18] would "in the main" protect labor. On April 7, 1939, Mr. Tom McGrath, General Counsel of the Brotherhood of Railroad Trainmen, the other appellee, testified before the Committee. (See pp. 387–405 of the Senate Hearings.) At page 401, Senator Wheeler referred to the paragraph of the bill reading:

> The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.

Concerning which (p. 402) Mr. McGrath said:

> I say this particular section 49 should carry with it, as a corollary, an agreement or provision protecting the men against loss of jobs in cases of consolidations and mergers. If they are entitled to that in one case, I think they are entitled to it in another; *and the same thing is true with respect to abandonments.* [Italics added.]

Senator Wheeler responded (p. 402):

> The CHAIRMAN. *Except it is the first time*

[18] This adjustment had reference to the so-called Washington agreement, entered into between 85 percent of the railroads of the United States and 21 labor organizations in 1936 for at least a 5-year period, covering provisions for the protection of labor in unification, consolidation, merger, and pooling cases. The Washington agreement did not apply to abandonments. Its provisions are summarized at page 241, House hearings on H. R. 2531, February 3, 1939. The Washington agreement is printed in its entirety beginning with page 231 of those hearings.

that your organization or anybody else has ever intimated that there should be written into the law any provision such as you are suggesting at the present time.

McGrath continued:

> When you say that the Commission must of necessity consider the interests of labor, then all I am saying is that if they must consider the interests of labor in consolidations and mergers, they should also consider the interests of labor where there is pooling of traffic. That is the only point. *Also I say if they are going to consider it in that connection, they should consider it where there is an abandonment of facilities.* [Italics added.]

Senator Wheeler's analysis of this proposal found expression in this statement (p. 404):

> The CHAIRMAN. Mr. McGrath, let me say to you that this committee has always gone just as far and a lot further than a great many people in this country think it should go; but in the interests of labor, itself, we cannot go so far as to say to them, "If you are going to abandon a line of railroad, the Interstate Commerce Commission has got to keep these men working."
>
> Mr. MCGRATH. I do not ask you to say that; but I am not going to quibble with you over that question.
>
> The CHAIRMAN. Candidly, I think what you are suggesting with reference to that is not in the interest of labor. I think it would be very injurious to labor in the long run.
>
> Mr. MCGRATH. That is, you mean if we were to insist that these men should be retained?

The CHAIRMAN. If you write in the same provisions, and you have the Washington agreement, that is what it would mean with reference to abandonments.[16]

[16] Just prior to this statement, the following colloquy between Senator Wheeler and Mr. McGrath occurred:

The CHAIRMAN. "But, Mr. McGrath, just stop and ask yourself this question: When a railroad company says to us, 'Here is a piece of track, out here, that is not making any money and there is no traffic on it, and we want to abandon it, because there is no freight to be hauled over it,' then what are we going to say to them? Are we going to say, 'You have to employ those men whether there is any traffic there or not'?

"As a matter of fact, suppose the Baltimore & Ohio Railroad's line between here and New York could not get any traffic and could not employ any men: Would you say that we should write into the law a provision which would result in our saying to the Baltimore & Ohio Railroad, under those conditions, 'You have to employ as many men, whether you have any traffic or not; and if you have no traffic, you must abandon it'? How can you do that?

Mr. MCGRATH. "I am not saying you should go that far, Senator."

The CHAIRMAN. "Well, take as an illustration the branch line running from Billings, Mont., up to Red Lodge: There used to be a lot of traffic over that branch; there was coal being shipped, and there was a great deal of traffic. Then the Northern Pacific began to get its coal at another place. Thereafter there was no traffic on the Billings-Red Lodge branch; it was more or less idle; and finally they abandoned it and put on some busses; there was not money enough. Now, if they are going to try to keep that up, when there is no traffic over it, it seems to me they are going to break down their whole labor structure—much more than by laying off a few men. Because if they do not, the whole financial structure of the railroads is going to break down; and if that does

In answer to the question by the Chairman as to what the Commission could require in cases of abandonment McGrath simply replied, "I do not know. They might require the employment of men on other positions with the railroad." McGrath further stated (p. 403):

> I am asking—if you put *discretionary* power in the Commission—that you make it broad enough to take care of these conditions, which we think merit consideration by the Commission. You are not imposing any obligation on them. [Italics added.]

Senator Wheeler asked with reference to the Washington agreement (p. 404):

> Why did you not provide in there the provisions for abandonments and other things that you are asking the committee to do?

The following colloquy took place:

> Mr. McGRATH. Now, Mr. Chairman, what about this proposition? Suppose a merger has taken place: there is no disclosure of

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happen and the railroads cannot make any money at all, then what is going to happen to labor?

"In other words, you cannot put impossible burdens on railroads and still have them pay wages to labor; that cannot be done."

Mr. McGRATH. "I understand that. However, I say that if the Commission has the power to put on those restrictions with respect to the men, in occasions of consolidation and merger, that would take care of it. I say that if, under this bill, you are going to give them such power, then let them have it with respect to abandonments as well as mergers (pp. 402–403, Senate Hearings on S. 2009)."

proposed abandonment of facilities, in that instance. It may be a freight house or a yard or something of that sort. As soon as it is approved and perfected and the abandonment is made, the men get no consideration, under this law. I believe that is something to consider.

The CHAIRMAN. I do not agree with you. When there is a consolidation, I think they take into consideration exactly what is going to take place and how many men they are going to lay off, and then they come under the Washington agreement.

The hearings before the Senate Committee were concluded on April 14, 1939, and on May 16, 1939, the Committee submitted its report to the Senate, explaining therein the changes made in the unification and consolidation provisions of the bill.[17]

The bill was debated on the floor of the Senate May 22 to May 25, 1939, when it passed by a vote of 59-6. (Cong. Rec., Vol. 84, part 6, p. 6158, May 25, 1939, 76th Cong., 1st Sess.)

Despite the fact that labor problems attended upon abandonments had been thus affirmatively brought to its attention, the Senate, when it passed the bill, saw fit to restrict it to the protection of employees' interests in cases involving consolidations and unifications alone. Section 49 (3) (c) merely read:

> The Commission shall require, as a prerequisite to its approval of any proposed

[17] Senate Rep. No. 433, May 16, 1939, 76th Cong., 1st Sess., pp. 28-29.

> transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected.

It appears that the proposition of protecting displaced employees in abandonment cases was squarely before the Senate Committee. The testimony discloses a grave reluctance to give approval to the protection of employees in abandonment proceedings.

Appellees argue the proposition that the objections voiced by the Chairman to McGrath's proposal related solely to the scope of the protection rather than the transaction affected. In view of Senator Wheeler's reference to specific illustrations of the ill effect of such provisions upon railroads in abandonment cases we feel that the appellees' construction is unfounded. It should here be pointed out that the Chairman voiced himself as strongly opposed to even a *discretionary* power in the Commission.

House proceedings.—In March 1939, Chairman Lea of the House Committee on Interstate and Foreign Commerce introduced a bill (H. R. 4862) similar to S. 2009, as to the abandonment and consolidation provisions, and also (in January) H. R. 2531.[18] With respect to consolidations,

[18] Entitled a bill to redistribute the functions of the Interstate Commerce Commission with a view to more efficient exercise of rate-making authority; to extend the jurisdiction of the Commission in relation to the fixing of minimum rates,

mergers, leases, etc., H. R. 2531 authorized the Commission to approve the proposed transaction "subject to such terms and conditions and modifications as it shall find to be just and reasonable," and if it "will promote the public interests."[10] The House hearings on the bill were protracted, running from January 24, 1939, to March 30, 1939 (p. 1789 of House Hearings). At these hearings Mr. Gray, one of the Committee of Six, said there was no disagreement whatever about protecting employees displaced by consolidations and mergers (p. 184 of House Hearings, February 1, 1939) and they had "a basis of compensation for men who are displaced and men who are disadvantaged by a consolidation or coordination" (pp. 193–194).

Mr. Harrison, president of the Railway Labor Executives Association, and a member of the Com-

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and rates for inland water transportation; to create a Railroad Reorganization Court; and for other purposes. Printed in Hearings, House of Representatives, January 24, 1939, pp. 1–17.

[10] In determining the public interest the Commission was to give due consideration to the promotion of the efficiency and economy of the carriers' service, the affording of better and cheaper service to the public, the securing of a simplified and more effective regulation of the carriers, the ultimate establishment of a number of strong and efficient systems, the due protection of the interests of the stockholders and creditors, the maintenance of such competition among the carriers as is necessary and reasonable in the protection of the public interest; and to all other relevant matters. (P. 3 of House Hearings.)

mittee of Six, told the House Committee it was in the public interest to protect the rights and interests of the employees who may be adversely affected by mergers (p. 214). He spoke of the provisions of the Washington agreement, then in force three years, and which "has worked out very satisfactorily" (p. 216), and added:

> "It does not provide as much protection as the workers would like to have; but that is a matter that we undoubtedly can work out with the employers, since they now accept the principle that the men are entitled to protection."[20]

At page 243, he said that the Washington agreement, generally speaking, had been satisfactorily maintained, adding:

> "Of course, the employees do not believe it is as liberal as it ought to be. We undertook to get more liberal provisions, but this was as far as we could get the managers to agree * * *. We have settled the question through collective bargaining and if it is not satisfactory, the burden is on us to proceed in the same way to try to change it.
>
> "So, I would not be here urging that you attempt to do anything different than what we are in agreement with our employers on."

In connection with abandonments, Mr. Harrison said:

> "The agreement does not cover instances where parts of railroad are abandoned.

[20] Mr. Harrison was here speaking of coordinations or mergers.

> We sought to get the protection extended in those cases, but the carriers declined to agree with the organizations to afford protection in instances of abandonments. * * *
>
> Now, I realize I am skating on thin ice and I do not want to be in any position of bad faith with our employers, because we have this agreement and if it is not satisfactory the burden is on us to change it. I would like to have an opportunity to talk that matter out with our employers before I should make any definite request upon the committee in that direction. I think we owe that to them to talk to them about it" (p. 244).

Summarized, this testimony of Mr. Harrison means that the carriers and labor had in good faith entered into the Washington agreement for a period of at least five years to protect labor in consolidation and coordination cases; that he was not asking Congress to go further and deal with abandonments, but that was a matter for negotiation with the railroads.

Mr. L. Alfred Jenny, Railroad Consulting Engineer, New York City, told the House Committee, page 1321:

> "The proposed bill does not indicate what, if any, protection is to be given to labor in case of railroad abandonments. * * *."

Commissioner Eastman, in his testimony, inserted in the record a copy of a letter from President Roosevelt to the railroads and labor representatives, dated March 6, 1936, which Mr.

Eastman stated led up to the Washington agreement (1722).[21]

As before referred to, S. 2009 passed the Senate on May 25, 1939. Following the extensive House hearings, on July 18, 1939, the House Committee

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[21] Extracts from this letter were—

"* * * What disturbs me is the apparent inability of the managements and the men to cooperate in working out such common problems. Issues which ought to be settled by friendly negotiation are being fought out in the battlegrounds of Congress and the courts. Legislation has its place. Often it has been necessary for the welfare of labor or capital or both, but it is a remedy to be taken with great caution or it may prove worse than the disease.

"A critical situation prompts this letter. It is common knowledge that there is much waste in railroad operation caused by the great number of railroad companies, and that much of it can be avoided either by consolidations or by greater cooperation and coordinated use of various facilities.

* * * * * *

"All this can be avoided if the contending parties will confer with each other in a spirit of reasonableness and moderation. The employees ought not to forget what they will gain if the railroads can progress as transportation agencies and what they will lose if the railroads retrogress. They ought to bear in mind that the principle of protecting employees against undue hardship from economy projects is only beginning to gain ground. It is not yet applied by most industries nor by the other transportation agencies, nor even by the Government. The railroad industry has always taken the lead in the establishment of good working conditions and labor relations, but it cannot safely get too far in advance of the procession. Nor ought the employees to overlook the fact that if unnecessary railroad costs are not avoided much desirable work that creates employment may not be undertaken. This has happened in maintenance work especially, and may easily happen again" (pp. 1721–1722 of House Hearings).

reported its own bill.[22] Instead of codifying the Act, as in the Senate bill, the House bill amended certain existing provisions of law, and added a Part III dealing with water carriers. No change was suggested in section 1 (18–20) applying to abandonments. With respect to section 5, covering consolidations, mergers, etc., the House bill required the Commission, in passing upon any transaction under section 5, to give weight to the following considerations, among others: (1) the effect of the proposed transaction upon adequate transportation service to the public; (2) where appropriate, the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) where appropriate, the total fixed charges resulting from the proposed transaction, and (4) where appropriate, the interest of the carrier employees affected. The House bill in subparagraph (e) of paragraph (2), section 5, adopted the provision in the Senate bill that "the Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected." This bill was debated in the House beginning July 21, 1939, and on July 24, 1939, Mr. Harrington of Iowa suggested an amendment as follows:

[22] Explained in House Report 1217, 76th Cong., 1st Sess., dated July 18, 1939.

"*Provided, however,* That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees."[23]

At page 9883 (Cong. Rec., Vol. 84, part 9, 76th Cong., 1st Sess.), Mr. Harrington explained his amendment as protecting "the railroad worker against any unemployment or any impairment of employment rights as a result of consolidations." The bill passed the House on July 26, 1939 (Cong.

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[23] The full paragraph with the Harrington amendment added reads as follows:

"(e) No consolidation, merger, purchase, lease, operating contract, or acquisition of control, which contemplates a guaranty of dividends, shall be approved by the Commission except upon a specific finding by the Commission that such guaranty is not inconsistent with the public interest. No consolidation or merger shall be approved which will result in an increase of total fixed charges on funded debt, except upon a specific finding by the Commission that such an increase in a particular case would not be contrary to public interest. The Commission shall require, as a prerequisite to its approval of any proposed transaction under the provisions of this section, a fair and equitable arrangement to protect the interests of the employees affected. *Provided, however, That no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees.*" [Italics added.]

(Cong. Rec. Vol. 84, part 9, pp. 9881–9882, July 24, 1939, 76th Cong., 1st Sess.)

Rec. Vol. 84, part 9, p. 10127, 76th Cong., 1st Sess.), containing the Harrington amendment and other changes in the Senate bill. On July 29, 1939, the bills were sent to conference.

Proceedings on recommittal.—While the bills were in conference, the Legislative Committee of the Interstate Commerce Commission submitted a report on the bills (House Committee Print, 76th Cong., 3d Sess.) in which it criticised the Harrington amendment.[24]

On February 8, 1940, there is a discussion in the House (Cong. Rec., Vol. 86, Part 2, 76th Cong., 3d Sess., pp. 1260–1264) of the savings to the carriers in consolidation cases, how labor would be affected and why the Harrington amendment was necessary to protect labor in consolidation cases.

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[24] This report (January 29, 1940) stated (p. 67):

"As for the proviso, the object of unifications is to save expense, usually by the saving of labor. Employees who may be displaced should, in the case of railroad unifications, be protected by some such plan as is embodied in the so-called 'Washington agreement' of 1936 between the railroad managements and labor organizations. The proviso, by prohibiting any displacement of employees, goes much too far, and in the long run will do more harm than good to the employees. In these days of intense competition from other forms of transportation, the railroads must, if they are to thrive and grow, conduct their operations with the utmost possible economy and efficiency. If they are prevented from doing this, further shrinkage of operations and continuing loss of employment are inevitable."

The effect of abandonments was only incidentally discussed.[25]

On April 26, 1940, in House Report No. 2016, 76th Cong., 3d Sess., the Conference Committee report was submitted. No changes were suggested in the abandonment provisions of existing law, and all changes made by the Senate and House bills in section 5, dealing with consolidations, were deleted, reverting to existing law.[26]

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[25] Chairman Lea was asked if he would accept the Harrington Amendment, and said: "I am not in position to accept it." "This is a question of abandonment or consolidation. Now, consolidation aids labor while abandonment destroys labor. * * * I am confident in my belief that the Harrington Amendment will not help labor. It would stand in the way of consolidation. Consolidations aid labor by keeping up lines that otherwise will have to be abandoned. Of course, it is a debatable question. No one can tell you that any particular labor or any particular number are going to lose their employment because of consolidations. Consolidations require, in the first place, the consent of the lines affected, a very difficult thing, on account of the matter of refinancing and other problems. It is very difficult to make consolidations. In the next place, no consolidation can be made unless it has the approval of the Commission" (p. 1263).

[26] The Conference Report—No. 2016, explains the changes in the consolidation features as follows (p. 61):

"The conference substitute provides for the retention of sections 5 and 213 as they are in the present law. * * *"

"These omitted provisions as to consolidation included the Harrington amendment which was adopted on the floor of the House. This amendment was adopted by the House as a protection against displacement of employees due to the consolidations that might result from the provisions of section 5. Employees had a fear of unemployment and to some

On the very day that the conferees made their report eliminating all changes in the consolidation provisions, including the Harrington amendment, April 26, 1940, the significant fact occurred of Mr. Harrington introducing a specific bill, H. R. 9563—"To prevent unemployment of railroad workers as a result of consolidations, combinations, agreements, or abandonments of railroads."[27] The proposed measure included protec-

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extent communities feared the loss of transportation due to the possible consolidations under present circumstances where a revival of the transportation industry might show that such consolidations were unwarranted.

Undoubtedly it is against the best interest of the country to eliminate transportation facilities that may be temporary surplus facilities but have the economic need and justification under normal economic conditions.

In any event the elimination of the consolidation provision from the bill obviates the necessity of guarding against the possible unemployment that might otherwise have resulted from these provisions."

[27] H. R. 9563, 76th Cong., 3d Sess., is short. It provides:

"*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That hereafter the Interstate Commerce Commission, in approving or authorizing any pooling contract, agreement, or combination, any division of traffic or earnings, or any consolidation, merger, purchase, lease, operating contract, or acquisition of control, described in section 5 of the Interstate Commerce Act, or in issuing any certificate permitting abandonments under paragraphs 18, 19, and 20 of section 1 of said Act, shall include in its order of approval or authorization, or certificate, as the case may be, terms and conditions requiring that such transaction not result in unemployment or displacement of employees of the railroad or railroads involved in such transaction, or in the impairment of existing employment rights of said employees."

tion of labor in abandonment cases. It is apparent that the introduction of this bill resulted from the action of the Committee of Conference on S. 2009 in eliminating Section 8 of that bill as passed by the House, which included the Harrington amendment. To our knowledge, H. R. 9563 was never reported out of Committee. But it does indicate that Mr. Harrington was dissatisfied with the treatment of labor in the Conference Committee report released the same day, and to meet the omissions of that bill, introduced his own bill, covering not only labor protection authority in consolidation cases, but in abandonment cases also.

At this juncture, Chairman Lea of the House Committee, spoke on the pending Transportation Bill, (Daily Cong. Rec. May 3, 1940, pp. 8516–8517) in the course of which he read a telegram to him, dated April 29, 1940, from Mr. A. F. Whitney, described as "the leader of this movement for the Harrington amendment", in which Mr. Whitney said:

> "Please be advised that opposition Brotherhood Railroad Trainmen to Senate bill 2009 was based upon the consolidation section of the bill. Now that conferees have eliminated that section, the source of our opposition is eliminated. However, we shall continue our earnest effort to obtain legal protection for labor in consolidation and abandonment situations" (p. 8517, Daily Congressional Record, May 3, 1940).

Continuing, Mr. Lea said:

> "It will be observed that the telegram confirmed the previous understanding of the conferees—that opposition was based upon the consolidation sections of the bill. The sentence of the telegram, 'Now that conferees have eliminated that section, the source of our opposition is eliminated,' confirmed our understanding of the situation. The last sentence of the telegram stating, 'We shall continue our earnest effort to obtain legal protection for labor in consolidation and abandonment situations,' was construed in light of the fact that Mr. Harrington filed a separate bill proposing to deal with that situation" (p. 8517).

Discussing another revised Harrington amendment,[28] made a subject for a motion to recommit on

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[28] This revised Harrington amendment provided:

"(f) As a prerequisite to its approval of any consolidation, merger, purchase, lease, operating contract, or acquisition of control, or any contract, agreement, or combination, mentioned in this section, in respect to carriers by railroad subject to the provisions of part 1, *and as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected.* In its order, or certificate, granting approval or authorization of any transaction referred to in this paragraph, the Commission shall include terms and conditions providing that such transaction will not result in employees of said carrier or carriers being in a worse position with respect to their employment. [Italics added.]

Notwithstanding any other provision of this act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or

May 2, 1940, by Mr. Wadsworth (Cong. Rec. Vol. 86, part 5, 76th Cong. 3d sess., p. 5427), Mr. Lea stated:

> "A consolidation contemplates the general continuance of the service of a carrier but the possible or probable reduction in the number of its employees. The proposal that the Commission be authorized to require as a condition of its approval of a consolidation that fair and equitable arrangements be made to protect the interest of the employees is the same as was embodied in the House bill as reported to the House. It was adopted without any opposition in the House committee reporting the bill. It manifested the desire of the House committee to give fair and reasonable protection to employees dismissed by reason of consolidations" (p. 8516).

On May 9, 1940, the Conference Report was called up in the House (Cong. Rec. Vol. 86, part 6, p. 5836, 76th Cong., 3d Sess.) and Chairman Lea reviewed the history of the bill and the insertion of the Harrington amendment and in connection with the motion to recommit of Mr. Wadsworth, Mr. Lea said (Congressional Record for May 9, 1940, Vol. 86, part 6, p. 5864):

> "This amendment goes beyond the Harrington amendment. It includes abandonments, in case of substitute railroad service, * * *.

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carriers by railroad and the duly authorized representative or representatives of its or their employees" (p. 5428—Vol. 86, part 5, Cong. Rec., 76th Cong., 3d Sess.).

When a railroad is abandoned its tracks are torn up and the investment is largely destroyed, and to apply the same test or requirement as to taking care of labor in abandonments as in cases of consolidation is entirely unwarranted."

In explaining the reasons for his amendment, on May 9, 1940, Mr. Harrington, at page 5869, said:

"Mr. HARRINGTON. Mr. Speaker, when I offered my amendment last July I did so because there was no protection in the bill for the employees in the event of consolidation, nor is there adequate protection for them in the present law, and it is for this reason, and this reason only that I believe you should vote to recommit the bill, with instructions to the managers on the part of the House that they insist that the modified language for labor protection be placed in the bill together with the change in the present law which will contain the consolidations sections requested by the railroads."

Mr. Wolverton, one of the conferees, at page 5878, said:

"* * * After long and careful consideration of the matter by the conferees it was decided that the best possible manner to deal with the controversial amendment was to strike out all reference to consolidations, mergers, and so forth, in the bill, and thereby remove the cause of the fear of wholesale dismissals that the Harrington amendment sought to protect railroad employees against."

On May 9, 1940, the House, by a vote of 209 to 182, adopted Mr. Wadsworth's motion to re-

commit directing the conferees to include, among other things, the revised Harrington amendment.[29] (Cong. Rec. May 9, 1940, Vol. 86, part 6, 76th Cong. 3d Sess., p. 5886.) Again the matter was considered by the conferees and on August 7, 1940, the conference report was submitted to the respective Houses. (See House Report No. 2832, 76th Cong. 3d Sess.) No material change was made in the abandonment sections of the act but again a revised compromise Harrington amendment was adopted by the conferees,[30] in which all reference to abandonments was omitted. The conference

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[29] Printed in footnote 28, page 31, *ante*.

[30] It read:

"SEC. 5 (2) (f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

report (pp. 68–69) explained the reasons for revising the Harrington amendment:

> "The substitute proposal for the Harrington amendment, as recommended to the conferees by instruction of the House, provided in substance that in case of consolidations and other unifications involving carriers by railroads, the Commission should in its order of approval require fair and equitable arrangements to protect the interests of the railroad employees affected. This provision has been retained in the substitute amendment agreed upon in conference.
>
> The instruction of the House also made the provisions of the amendment applicable to the case where another means of transportation was substituted for rail transportation proposed to be abandoned. This provision is omitted from the substitute adopted in conference. A consideration of the application of this provision was, in the judgment of the conferees, found to be impracticable of proper administration."

On August 12, 1940, the conference report was called up in the House, and at page 10178 (Vol. 86, part 9, Congressional Record, 76th Congress, 3d Session), Chairman Lea said:

> "Another provision was that where there is a substitution of transportation, for instance, by truck instead of rail, the employees of the abandoned line should have under those circumstances an order of the Commission fairly protecting their rights against unemployment. That is the only provision that is eliminated in this conference report."

Mr. Halleck, one of the conferees, explained the revised Harrington amendment as follows (p. 10187):

"* * * This language gives to the employees greater protection and more far-reaching protection and recognizes the principle to which we all subscribe, that rights of employees should be protected, and, beyond that, writes it into law.

Mr. HARRINGTON. Mr. Speaker, will the gentleman yield?

Mr. HALLECK. I yield to the gentleman from Iowa.

Mr. HARRINGTON. Does it take care of the employees with respect to abandonments?

Mr. HALLECK. I do not understand that it does, but I may say to the gentleman from Iowa that when he first offered his amendment the amendment did not take care of abandonments."

Mr. Wolverton, another House conferee, speaking of the Harrington amendment, said (p. 10189):

"* * * It was recognized that the real intent of the sponsors was to save railroad employees from being suddenly thrust out of employment as the result of any consolidation or merger entered into. The Committee on Interstate and Foreign Commerce of this House in presenting its original bill used language which it thought accomplished that purpose. We thought we were giving legislative assurance of at least a continuance of the Washington agreement which had been previously entered into by the railroads and the 21 railroad brotherhoods. This agreement had furthermore been recognized and accepted by the Interstate Commerce Commission as a condition

precedent for its approval in the Rock Island case, *United States* v. *Lowden* (308 U. S. 225), and this action of the Commission has been affirmed by the Supreme Court of the United States in a suit attacking its validity. We thought that the language we had used not only established this agreement for all succeeding cases of consolidation or merger but that the language used would not preclude the Commission from improving upon the terms of that agreement if necessary to provide equitable and fair treatment of employees affected by any consolidation or merger in the future. Thus, it will be seen that there has been no difference in thought and desire between the committee and the sponsors of the Harrington amendment. In fact the provision contained in the original bill had the approval of 20 out of the 21 railroad brotherhoods. And, it is significant in this connection that the one brotherhood which did not agree to our language had never asked for anything other than that the entire consolidation provision be left out of the bill and the matter be left at this time as a matter for collective bargaining."

On the same date, August 12, 1940, a motion to recommit was rejected by a vote of 212 to 112, and the bill passed the House 247 to 75 (pp. 10193–10194, Cong. Rec. August 12, 1940, Vol. 86, part 9).

On August 30, 1940, the bill was submitted to the Senate (Cong. Rec., Vol. 86, part 10, 76th Cong., 3d Sess., p. 11269) and debated. On September 5, 1940, Senator Reed, one of the conferees, in answer to a question from Senator Mead, said:

"We have made provision for railroad labor in the so-called Harrington amendment—that is, the amendment which was called the Harrington amendment—which is satisfactory to all the operating brotherhoods, so far as I know. If there is any objection to it, I am not aware of it" (p. 11545).

On September 9, 1940, Senator Wheeler, Chairman of the Committee, submitted the following explanation of changes in the present law made by the Harrington amendment (Cong. Rec., Vol. 86, part 11, 76th Cong., 3d Sess., p. 11768):

"Present law is also amended by inclusion of the Harrington amendment, protecting employees in the event of consolidations and by directing the Commission to give weight to the following questions when passing upon any proposed transaction: First, the effect upon adequate transportation service to the public; second, effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved; third, the total fixed charges; and, fourth, the interest of the carrier employees affected. The Commission is also instructed not to approve any consolidation, merger, etc., which contemplates a guaranty of dividends, except upon a specific finding that such guaranty is not inconsistent with the public interest."

The bill passed the Senate on the same day (September 9, 1940) and on September 18, 1940, was signed by the President.

The legislative history is quite lengthy, on account of the tortuous course of the bill through the two Houses.[31] It is important, however, because it shows in our opinion that what the employees were primarily concerned with was protection for them in consolidation and unification cases and to put in statutory form what the carriers and labor had voluntarily agreed to in the Washington agreement. Whether similar provisions should be included in abandonment cases was regarded as highly controversial in nature. The brotherhoods, as shown by the testimony of Mr. Harrison, one of the Committee of Six, did not want to go so far, at least until they had a chance to take it up with the carriers and attempt to settle the question by collective bargaining. The significance of the action of Congressman Harrington in introducing on April 26, 1940, a separate bill to protect labor in abandonment as well as other types of cases—the same day the conference report came out showing there was no protection in the pending bill as to abandonments, is apparent, as is also the provision in the revised Harrington amendment on recommittal that

> "as a prerequisite to its approval of the substitution and use of another means of transportation for rail transportation proposed to be abandoned, the Commission shall require a fair and equitable arrange-

[31] A chronology of the legislation follows as Appendix C, infra, pp. 76–77.

ment to protect the interests of the railroad employees affected."[32]

When the conferees modified the bill to eliminate this feature which had created such debate and passed a bill with such protection deleted, it seems to us that Congress fully considered the question and decided not only that it had not conferred, but was declining to confer, upon the Commission the authority here invoked. The holding of the lower court to the contrary (R. 66) is a complete disregard of the legislative history. Consequently there is no need for the court to determine whether the general language "such terms and conditions as in its judgment the public convenience and necessity may require" includes protection of labor in abandonment cases, because the question has been answered by Congress. Whether such authority is desirable and should be granted is not for the Commission or for the courts. It is enough that such authority has not been granted.

In considering the legislative history of the 1940 act as a determinative of what Congress meant by a clause in the 1920 act relating "to such terms and conditions as in its [the Commission's] judgment the public convenience and necessity may require", we have a precedent in

[32] The case before the Court involves not only abandonment of some lines but substitution of rail service by motor vehicle as to others (R. 27).

United States v. *Hutcheson*, 312 U. S. 219, where this court referred to the legislative history of the Norris-LaGuardia Act of March 23, 1932, in interpreting the Sherman and Clayton Acts. The 1920 and 1940 Transportation Acts constitute a "harmonizing text" (p. 231) and are not to be read as a "tightly drawn amendment to a technically phrased tax provision" (p. 235). See also *United States* v. *Lowden*, 308 U. S. 225, 237–239.

II. A definitely settled administrative construction is entitled to the highest respect and if acted upon for a number of years, such construction will not be disturbed except for cogent reasons

Section 1, paragraphs (18–20), added to the Act by the Transportation Act of 1920, were left virtually unchanged by the Transportation Act of 1940. Acting under the provisions of these paragraphs, the Commission between 1920 and October 31, 1941, granted 1,696 applications to abandon, involving 27,722 miles of road.[33] For 20 years the Commission has had before it for interpretation the same provisions regarding its authority over abandonments by railroad carriers.

As this Court has often held, contemporaneous or long-continued practice constituting interpretation of an empowering statute is entitled to great weight. Especially is this so where, as here, there has been substantial reenactment of the statute by Congress following the administrative

[33] The details will be found in Appendix B, page 75, *infra*.

interpretation. Mr. Justice McKenna, in *United States* v. *Hermanos,* 209 U. S. 337, at p. 339, said:

> "* * * and we have decided that the reenactment by Congress, without change, of the statute which had previously received long-continued executive construction, is an adoption by Congress of such construction."

The first reported case in which the Commission was requested to exercise the authority sought was F. D. 10174, *Chicago Gt. W. R. Co. Trackage,* 207 I. C. C. 315 (May 14, 1935). For the first 15 years following the grant of authority to the Commission to impose such terms and conditions as the public convenience and necessity may require, no similar request to that here involved was made upon it, and apparently it did not occur to the Commission that it had such authority. This action of the body charged with the administration of the statute, together with the attitude of those most vitally affected thereby, constitutes a recognition that the statute did not confer such authority. In *United States* v. *Cooper Corp.,* 312 U. S. 600, 614, Mr. Justice Roberts said:

> "In these circumstances the conviction that no right to sue had been given the Government, rather than a supine neglect to resort to an available remedy, seems to us the true explanation of the fact that no such actions have been instituted by the United States."

The language of this Court in declining to sustain an order of the Federal Trade Commission in

Trade Commission v. *Bunte Bros.*, 312 U. S. 349, 351–352, is appropriate:

> "That for a quarter century the Commission has made no such claim is a powerful indication that effective enforcement of the Trade Commission Act is not dependent on control over intrastate transactions. Authority actually granted by Congress of course cannot evaporate through lack of administrative exercise. But just as established practice may shed light on the extent of power conveyed by general statutory language, so the want of assertion of power by those who presumably would be alert to exercise it, is equally significant in determining whether such power was actually conferred. * * *"

Moreover, the intervening Transportation Act of 1940 left unchanged the Commission's construction of the Act and lends great weight to the administrative ruling.[34]

The Commission clearly and fully explained its declination of unwarranted authority in *Chicago Gt. W. R. Co. Trackage, supra,* decided in 1935. The Commission said (p. 321):

> "It will be noted that the power to attach terms and conditions to certificates is restricted to such as may be required by the public convenience and necessity. In *Wis-*

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[34] In *United States* v. *Amer. Trucking Assns.*, 310 U. S. 534, 549, this court said:

"In any case such interpretations are entitled to great weight. * * *

It is important to remember that the Commission has three times concluded that its authority was limited to securing safety of operation."

consin Telephone Co. v. *Railroad Commission,* 162 Wis. 383, 'Public convenience and necessity' was defined as 'a strong or urgent public need.' *Public-Convenience Application of Utah Terminal Ry.,* 72 I. C. C. 89.

"In the present case the conditions sought have no relation to the public convenience and necessity; they are offered for the purpose of maintaining a private benefit, the benefit of continued employment. From the standpoint of effect this case is similar to cases involving the abandonment of lines of railroad with resulting unemployment. We have consistently held that the effect of abandonment upon employment cannot be controlling in the disposition of such cases. To hold otherwise would place us in the position of attempting to insure employment to the personnel of carriers whether or not the affected employees were needed."

Then, referring to a decision construing section 5 (4), the consolidation provisions, the Commission declared:

"* * * The present proceeding differs from that one in that it is brought under the provisions of section 1 (18–20). Our power to impose conditions is stated in different terms in the two sections. Whatever may be the extent of our right to attach conditions in section 5 (4) proceedings we are of the view that under section 1 (20) the terms and conditions we may attach must be such as in our judgment public convenience and necessity require. We may not properly borrow from section 5 (4) and read into section 1 (20) the power to impose such terms and conditions as we may find to be just and reasonable.

> Our sympathy for employees and full realization of the hardship that may and often does result to them in the administration of the abandonment and other provisions of section 1 (18–20) do not enlarge our statutory power or enable us to attach any conditions except those required by public convenience and necessity."

This interpretation has been consistently followed by the Commission in subsequent cases, decided prior to and after this Court's decision in *United States* v. *Lowden, supra.*[35]

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[35] The cases referred to are as follows: *Atchison Topeka & Santa Fe Railway Company Abandonment*, 212 I. C. C. 423, 426; *Delaware River Ferry Company of New Jersey Abandonment of Operation*, 212 I. C. C. 580, 583; *Colorado and Southern Abandonment*, 217 I. C. C. 366, 381; *Pooling of Ore Traffic in Wisconsin and Michigan*, 219 I. C. C. 285, 294; *Chicago, Rock Island & Pacific Railway Company Trustees Abandonment*, 230 I. C. C. 341, 347; *Copper River & North Western Abandonment*, 233 I. C. C. 109, 113; *Gulf, Texas & Western Railway Company Abandonment*, 233 I. C. C. 321, 331; *Quincy, Omaha & K. C. Co. Abandonment*, 233 I. C. C. 471, 485–487; *Chicago, Springfield & St. Louis Railway Company Abandonment*, 236 I. C. C. 765, 770–772; *Tonopah & Tidewater Railroad Company Abandonment*, 240 I. C. C. 145, 150; *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment*, 240 I. C. C. 183, 185; *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment*, 240 I. C. C. 763, 771; the instant case, *Pacific Electric Railway Company Abandonment*, 242 I. C. C. 9, 23–24; *Southern Pacific Company et al. Abandonment*, 242 I. C. C. 283, 289–290; *Texas Electric Railway Company Abandonment*, 242 I. C. C. 765, 768; *Sacramento & Northern Railway Company Abandonment*, 247 I. C. C. 157, 158; *Texas & Pacific Railway Company Operation*, 247 I. C. C. 285, 293.

In *Chicago, Milwaukee, St. Paul & Pacific Railroad Company Trustees Abandonment,* 240 I. C. C. 763, decided August 12, 1940, the Commisison stated (p. 771):

> "* * * Relying upon the decision of the Supreme Court in *United States* v. *Lowden,* 308 U. S. 225, decided December 4, 1939, he contends that if the application herein be granted, in whole or in part, our certificate permitting abandonment should contain a condition requiring the applicants to compensate employees for losses which they may suffer by reason of discharge or transfer as a result of such abandonment. The above-mentioned decision, however, is the culmination of a proceeding involving the lease of railroad properties under section 5 (4) of the Interstate Commerce Act, as amended. The instant case is an abandonment proceeding under section 1 (18) of the act. The distinction between cases arising under section 1 (18–20) and those arising under section 5 (4) of the act, with respect to the Commission's authority to impose conditions affecting employees, is discussed in *Chicago, G. W. R. Co. Trackage,* 207 I. C. C. 315."

This view was adhered to by the Commission in its decision in this case (R. 40–41).

On two occasions has this refusal to assume further power been called to the attention of Congress. In its 49th Annual Report, pp. 37–38, the Commission specifically referred to its holding in the *Chicago Great Western Case,* and recommended (p. 97):

"1. That further statutory provisions be enacted to protect employees from undue financial loss as a consequence of authorized railway abandonments or unifications found to be in the interest of the general public, or otherwise lawfully effected."

In its 50th Annual Report (p. 107) the Commission renewed its recommendation of the previous year.

'We feel it is pertinent that Congress, since the Commission's decision in the *Chicago Great Western Case* and its recommendations thereon, has seen fit to amend the Interstate Commerce Act in several particulars,[36] without conferring the authority sought. Most certainly this is not a situation in which Congress has acted in ignorance of administrative construction. Indeed Congress has required the Commission by law to report annually concerning questions connected with the regulation of commerce "together with such recommendations as to additional legislation relating thereto as the Commission may deem necessary."

Congress has had ample opportunity to vest authority in the Commission to provide for employees in abandonment cases. The section under consideration has been an integral part of our national transportation policy for some twenty years and although the act as a whole has under-

[36] August 9, 1935, 49 Stat. L. 543, and June 29, 1938, 52 Stat. L. 1236, and also by the Omnibus Transportation Act, 1940, approved by the President on September 18, 1940, 54 Stat. L. 898.

gone transitions this section has remained practically intact. For at least six years in numerous decisions that section had received an undeviating interpretation. We submit that Congress, in amending the Interstate Commerce Act, has done so with full knowledge of the administrative interpretation placed upon that section of the act before this Court, and that Congress has rather expressly declined to confer the authority sought.

(a) The Commission is a creature of Congress, and has only those powers which are delegated to it by Congress

The Commission is a creature of Congress, operating under delegated powers, and its jurisdiction is only that conferred upon it by law. (*Atchison, T. & S. F. Ry. Co.* v. *United States*, 284 U. S. 248.) Its sphere is the regulation of carriers and, within the limits of its delegated powers, the Commission is supreme. The Commission's field is circumscribed by the language of the various acts under which it operates.

In *Kansas City Southern Ry. Co.* v. *Kansas City Terminal Ry. Co.*, 211 I. C. C. 291, at page 304, the Commission said:

> "* * * We are invested with no roving commission to carry out the policy of Congress; our powers are those delegated to us by the various sections of the Interstate Commerce Act and other acts which define the standards of right and obligation and delegate to us the function of finding the facts, determining the issues, and making the regulations necessary to give effect to those standards. * * *"

In *Interstate Commerce Commission* v. *Los Angeles*, 280 U. S. 52, the Commission had denied its power to order the railroads serving the City of Los Angeles to build and use a new passenger station in that City. In holding that the Commission was correct in refusing to assume jurisdiction, this Court said (p. 70):

> "* * * If Congress had intended to give an executive tribunal unfettered capacity for requisitioning investment of capital of the carriers and the purchase of large quantities of land and material in an adverse proceeding, we may well be confident that Congress would have made its meaning far clearer and more direct than in the present meager provisions of the Transportation Act. * * *"

It is significant that in this case the Court was considering, among other provisions, sections 1 (18) and (20) of the Act.

In *Interstate Commerce Commission* v. *Oregon-Wash. R. Co.*, 288 U. S. 14, this Court held that the words in the statute that the Commission could require a carrier "to extend its line or lines" (p. 34)—which appear to us to be far more definite in nature than the words "such just and reasonable terms and conditions as in its judgment the public convenience and necessity may require"—were insufficient to sustain a Commission order requiring the railroad company to construct a line 185 miles long, across central Oregon (p. 28). The Court said, p. 35:

> "* * * We should expect, if Congress were intending to grant to the Commission a new and drastic power to compel the investment of enormous sums for the development or service of a region which the carrier had never theretofore entered or intended to serve, the intention would be expressed in more than a clause in a sentence dealing with car service. * * *"

Also, at pp. 35–36, this Court said:

> "Moreover, if the purpose were that claimed by the Commission, support should be found in legislative history. But none has been called to our attention. In the report to Congress for 1919 the Commission reiterated an outline of the policies previously suggested for legislative action in view of the approaching termination of federal control. No intimation is given that carriers should be required to build into territory they had not undertaken to serve. The scope of the recommendation was not enlarged in the testimony before the committee of the Senate having the Transportation Act in charge."

How different is the legislative history in this case, discussed fully in chapter I.

It is also pertinent to inquire if mandamus would lie to compel the Commission to exercise the authority sought. In *United States* v. *Interstate Commerce Commission*, 294 U. S. 50, 63, this Court said:

> "* * * Where the matter is not beyond peradventure clear we have invariably refused the writ, even though the question were one of law as to the extent of the stat-

> utory power of an administrative officer or body. * * *"

Was the Commission "so plainly and palpably wrong as matter of law that the writ should issue"? (P. 61.) We think not. Should a different decision or rule be applied because the case comes up under the Urgent Deficiencies Act rather than by mandamus?

In *United States* v. *Cooper Corp., supra,* this Court said:

> "* * * it is not our function to engraft on a statute additions which we think the legislature logically might or should have made."

In that case this Court also held that the connotation of a term in one portion of an Act may often be clarified by reference to its use in other portions (p. 606). The terms "public convenience and necessity" are contained not only in paragraphs (18) and (20) of section 1 but also in sections 203 (a) (2) and (5), 206 (a), 207 and 208 of Part II, and section 309 of Part III of the Interstate Commerce Act. Under the authority conferred upon the Commission by paragraph (21) of section 1 authorizing the Commission to require a carrier by railroad to "extend its line or lines," there is a proviso requiring the Commission to find "as to such extension," that it is reasonably required in the interest of "public convenience and necessity." The words "public convenience and necessity" as used in this last-

mentioned paragraph would hardly be construed broadly enough to include the interest of employees interested in the extension, but if they are not given that meaning, appellees' contention with respect to the authority of the Commission in abandonment cases, if adopted, means that the same words would have different meanings in the same Act, and in paragraphs applying to the same subject matter. Paragraphs (18–21) of section 1 are part of a single statutory scheme governing the construction of new lines and the abandonment of old lines. The Court will adopt a construction not contrary to "the scheme and structure of the legislation". (*Cooper Case, supra*).

(b) Analogy of words "public convenience and necessity" in state statutes

In 1920, when section 1 (18–20) was added to the Act, the words "public convenience and necessity" were used in some state regulatory statutes. The meaning given to these words by state tribunals has been accorded much weight by the Commission from its early days.[37] In *Wisconsin Tel. Co.* v. *Railroad Commission*, 162 Wis. 383, 156 N. W. 614, the state Court said (p. 617):

> "* * * The words 'convenience and necessity' mean urgent, immediate public need. *In re Appl. Shelton St. Ry. Co.*, 69 Conn. 626, 38 Atl. 362. So held under a statute prohibiting construction of parallel

[37] See *Public Convenience Application of Utah Terminal Ry.*, 72 I. C. C. 89, 93–94; *Public Convenience Application of A. & S. A. B. Ry.*, 71 I. C. C. 784, 792.

lines of street railroad except when public convenience and necessity required it. Necessity does not exist unless the inconvenience would be so great as to amount to an unreasonable burden on the community. * * *"[35]

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[35] Decisions of other tribunals were:

(California). A certificate to operate an auto stage or freight service, should be granted or withheld upon the basis of whether the rights, welfare, and interest of the general public will be advanced and not upon the private benefit or advantage that may accrue to any carrier, shipper, or consignee. *Re Motor Transit*, P. U. R., 1922 D, 495.

In Missouri, *Re McCartney*, P. U. R. 1928 C, 182 is a similar holding.

(New York). *In re International R. Co.* (1917), 6 P. S. C. R. (2d Dist. N. Y.) 174; the question was whether public convenience and necessity required the extension of street railway tracks. The Commission said: "Will this additional trackage add to the usefulness of the company's property as a whole? Will it enable the company to render more efficient and satisfactory service to its patrons? Can the members of the traveling public reach their several destinations more quickly and comfortably? If these things are so then private interests must not prevail."

(Rhode Island). The convenience and necessity mentioned in a statute authorizing a commission to determine whether public convenience and necessity require the operation of jitneys, must be "public" in its nature, and all considerations that are merely private or selfish should be eliminated. *Re Applications for Certificates to Operate Jitneys*, P. U. R. 1922 E, 612.

(Colorado). The needs or necessity of the carrier cannot be the controlling factor in determining whether a certificate of public convenience and necessity should be issued, but the question to be determined is what is necessary so far as the public is concerned. *Re Bross Application*, No. 3946 B, Docket No. 12744, Dec. 19, 1938.

(Maine). Convenience and necessity which the law requires to support the Commission's order in grant of appli-

The Court will be interested in what meaning the Commission has given to the words "public convenience and necessity." In *Public-Convenience Application of Utah Terminal Railway*, 72 I. C. C. 89, at pp. 93–94, the Commission said:

> "* * * 'Public convenience and necessity' has been defined as 'a strong or urgent public need.' *Wis. Telephone Co.* v. *Railroad Comm.*, 162 Wis. 383; 156 N. W. 614. A public need can hardly be predicated upon the demand of three shippers who may desire to introduce the element of competition in order to improve their position in their own competitive field * * *."

In *Public-Convenience Application of A. & S. A. B. Ry.*, 71 I. C. C. 784, at page 792, the Commission stated:

> "* * * That such operation would be a matter of convenience to the two remaining shippers of fish may be conceded, but it

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cation of convenience and necessity is the convenience and necessity of the public as a whole, as distinguished from that of an individual or group of individuals. *Re Stanley* (1934), 5 P. U. R. N. S. 359, 133 Me. 91, 174 Atl. 93.

(South Dakota). Authority to operate as a motor carrier will not be granted because the applicant has purchased a truck, needs the work, would lose his truck and all that he has invested in it if his application is denied, and he needs the permit to do trucking in order to keep off of relief, since the law relating to establishing public convenience and necessity requires a showing of a demand on the part of the public for the service proposed and the Commission is unable to give weight to reasons which are entirely personal. *Re Yahne*, Order No. 7254 B, March 29, 1937.

> can hardly be said to be a matter of necessity. The term 'public convenience and necessity' implies both convenience and necessity since the words are not synonymous but must be given a separate and distinct meaning * * *."

In *Ocean S. S. Co. of Savannah*, 203 I. C. C. 155, 163, the Commission said:

> "'In the public interest' is an elastic and significant phrase, but it can hardly be expanded to include the conditions and practical requirements of a certificate of convenience and necessity under paragraph 18 of section 1 of the act."

(c) Nature of "terms and conditions" imposed by Commission in abandonment cases

A question of interest is what general meaning the Commission may have given in illustrative cases, to the words "terms and conditions" as used in the paragraph. In *Certificate for Eastern Texas R. R.*, 65 I. C. C. 436, the Commission granted permission to abandon a line on condition that before one year thereafter the applicant shall furnish to the Commission a good and sufficient bond that it will within that period pay all outstanding obligations. In *Abandonment of Branch Lines by Detroit & Mackinac Ry.*, 131 I. C. C. 9, the Commission stated that abandonment of a line may be conditioned on the sale of the line within a specified time at a price not exceeding its scrap value to any person, firm, or corporation

desiring to purchase same for continued operation.[39]

III. The decision in *United States* v. *Lowden*, 308 U. S. 225, is not controlling

Appellees base great reliance upon the decision of this Court in *United States* v. *Lowden*, 308 U. S. 225. In that case the Court was construing Section 5 (4) of the Act, which contained the following provision:

> "If * * * the Commission find that, subject to such terms and conditions and such modifications as it shall find to be *just and reasonable*, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control * * * will promote the *public interest*, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control upon the terms and conditions and with

[39] Other Commission decisions are:

In *Abandonment of Branch Line by New York, New Haven & Hartford R. R.*, 90 I. C. C. 3, a certificate for branch line abandonment was issued on condition that the applicants shall sell such line to the city in which it is located.

In *Abandonment by Southern Ry.*, 145 I. C. C. 355, in authorizing abandonment the Commission required the applicant to provide a truck service or other means of transportation for products ready for shipment, and to charge for such service the same rates that it would have charged for freight service.

In *Norfolk & Western R. Co. Abandonment*, 193 I. C. C. 363, the Commission held that an abandonment may be authorized on condition that applicant donate to the proper county authorities certain portions of its right-of-way.

the modifications so found to be *just and reasonable.*" [Italics supplied].

There are important distinctions between that case and this. In the first place, in the *Lowden Case* the Court was affirming an interpretation placed upon a disputed statute by the body charged with its administration; here the Court is being asked to reach a conclusion contrary to that of the administrative tribunal. The test in the *Lowden Case* was the "public interest" while the test here is "public convenience and necessity," which have a narrower meaning than the words "public interest." The distinction is explained in the Commission's report in this case (R. 40–41). In sustaining the Commission's action in the *Lowden Case,* the Court referred to the history of railroad labor relations in the United States in mitigation of the hardship imposed on the employees in carrying out a national policy of railway consolidation, which would have to be disregarded. That history was supported by reference to the Washington agreement and the report of the Committee of Six, seeking the protection of labor in consolidation cases. Neither the Washington agreement nor the report of the Committee of Six cover protection of labor in abandonment cases. In sustaining the Commission's action in the *Lowden Case,* the Court referred to the legislative history of S. 2009. A similar consideration here of the legislative his-

tory of that bill, as discussed in Chapter I of this brief, leaves no doubt that the Commission was right in its conclusion. At page 239 of the Court's decision in the *Lowden Case,* this Court referred to doubts that the Commission had at one time entertained as to its authority in consolidation cases, which doubts had gradually been removed by an assumption of such authority. No such doubts can be relied upon in this case, because the Commission has consistently taken the view that the statute does not confer the authority sought. Finally at pages 239–240 of this Court's decision in the *Lowden Case,* the Court referred to "the congressional judgment of those conditions," which "congressional judgment" here shows overwhelmingly, in our opinion, that there is no basis for the contention that Congress has conferred the authority invoked. Then the *Lowden Case* emphasized the national policy of consolidation and referred to the duty imposed upon the Commission as to plans of consolidation. This duty was removed by the 1940 Act.

The fact that the Commission can attach conditions for the protection of labor in a consolidation case, while it may not in an abandonment case, is entirely logical. In some cases abandonment proceedings may, and frequently do, precede complete liquidation of railroad carriers, usually short lines which have outlived their usefulness and are no longer capable of anything like profitable oper-

ation. A requirement that such abandonment could be permitted only on condition that the employees be continued in their jobs would be a complete contradiction and an impracticability, because of the fact that discontinuance of operations would remove the only source of income from which the wages of the employees could be paid.

When a railroad carrier abandons a part of its line, usually a branch, the compelling reason commonly is a permanent loss of traffic which entails a financial burden on the other parts of the system (Cf. *Colorado* v. *United States*, 271 U. S. 153, 163). The abandonment permits the railroad company to reduce its investment in the abandoned facilities and the taxes thereon. The employees engaged in operations on an abandoned branch,[40] however, do not lose their status as employees of an operating railroad company, as they usually do if their company were absorbed by an-

[40] In the complaint (R. 3) it is alleged that employees will experience a net wage loss of $301,896 annually. The Commission did not go into this because of its view that it had no authority to protect labor. Based on the unions' estimates, the Commission did state that the calculations indicated aggregate savings of $378,229, including a total of $301,996 as the cost of labor (R. 40). The Railroad Company, as the party possessing knowledge of these facts (R. 54), denied an annual net wage loss in any such amount, or in any amount in excess of $1,000 a month for a period not to exceed nine months, during which time it stated it would absorb back into its service all employees displaced (R. 54). If, as we contend, the Commission has no authority in this type of case, the question of wage losses is irrelevant.

other under a unification, but remain eligible for continued employment by the company to the extent that its business permits. In this respect their position is practically the same as that of employees who may be laid off by the railroad because of reduced operations on other parts of a system where the decline in traffic has not been so severe as to compel abandonment of those parts. There is no provision of law which insures employment to the latter employees, who would be left in a less favorable position than that of employees on abandoned branch lines protected against unemployment. Even the voluntary agreement between railroad management and labor known as the Washington agreement covers only "those changes in employment in the Railroad Industry solely due to and resulting from coordination."[1] It was agreed "that fluctuations, rises and falls and changes in volume or character of employment brought about solely by other causes are not within the contemplation of the parties hereto, or covered by or intended to be covered by this agreement."

Congress has provided for the protection of dismissed railroad employees under the Railroad Un-

[1] The Washington agreement defines "co-ordination" as meaning joint action by two or more carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate railroad facilities or any of the operations or services previously performed by them through such separate facilities.

employment Insurance Act, 45 U. S. C. A., Section 351 *et seq.*

In 45 U. S. C. A., Section 363a, it is provided:

> "By enactment of this chapter the Congress makes exclusive provision for the payment of unemployment benefits for unemployment occurring after June 30, 1939, * * *"

Prior to this bill, the Federal Co-ordinator of Transportation in his Fourth Annual Report, had referred to his dismissal compensation bill (p. 55) involving consolidations, mergers, and unifications of facilities and concluded (p. 57) "that the best way of solving this problem would be by agreement, after negotiations, between the managements and the labor organizations. No constitutional limitations affect such agreements, and they have the advantage of being flexible and capable of change from time to time as need therefor may be shown in the light of actual experience." [42]

While it will be urged that the authority invoked here is merely discretionary in the Commission, and cases may be cited showing it would

[42] Fourth Annual Report, House Doc. 394, 74th Cong., 2d Sess. At page 54 of the report, the Co-ordinator said:

"The Co-ordinator entertains no doubt, therefore, that if the railroads are to progress and grow and build up business which will increase the sum total of railroad employment, it is essential that they utilize labor-saving devices, methods, and practices to the maximum and see to it that the low costs so attained are translated into rates and fares which will attract traffic."

apparently be no hardship for carriers to care for employees displaced by abandonments, our position is that Congress did not draw any line between discretionary and mandatory authority; it declined in all instances to extend this debated and much-disputed authority to the Commission.

The effect on the revenues of interstate carriers should the Commission be required even as a matter of discretion to impose conditions to protect labor in cases of the abandonment of unprofitable branch lines would be contrary to the scheme and spirit of the Transportation Act of 1920, seeking to provide the people of the United States with an adequate system of transportation (*New England Divisions Case*, 261 U. S. 184, 190).

Public convenience and necessity would be seriously interfered with if it were held that because a carrier abandoned a line operated at a loss it must pay compensation to employees." Losing lines are abandoned because they are a drain on the system and in order to terminate the drain, and because their continued operation, as the Commission found here, would be a "burden on interstate commerce." (R. 41.)

"The Commission stated: "For the past eight years the applicant has incurred deficits in net railway operating income ranging from $17,743 in 1936 to $826,505 in 1938, and a deficit of $608,989 in 1939." (R. 36.)

CONCLUSION

The decision of the lower court should be reversed and the complaint dismissed.

Respectfully submitted.

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APPENDIX A

Pertinent statutory provisions

(Amendments made by Transportation Act, 1940, shown in italics.)

NATIONAL TRANSPORTATION POLICY

It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1 (18–22) of the Interstate Commerce Act:

"(18) After ninety days after this paragraph takes effect no carrier by railroad subject to this part shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this part over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this part shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment. *Nothing in this paragraph or in section 5 shall be considered to prohibit the making of contracts between carriers by railroad subject to this part, without the approval of the Commission, for the joint ownership or joint use of spur, industrial, team, switching, or side tracks.*

"(19) The application for and issuance of any such certificate shall be under such rules and regulations as to hearings and other matters as the Commission may from times to time prescribe, and the provisions of this part shall apply to all such proceedings. Upon receipt of any application

for such certificate the Commission shall cause notice thereof to be given to and a copy filed with the governor of each State in which such additional or extended line of railroad is proposed to be constructed or operated, or all or any portion of a line of railroad, or the operation thereof, is proposed to be abandoned, with the right to be heard as hereinafter provided with respect to the hearing of complaints or the issuance of securities; and said notice shall also be published for three consecutive weeks in some newspaper of general circulation in each county in or through which said line of railroad is constructed or operates.

"(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. Any construction, operation, or abandonment contrary to the provisions of this paragraph or of paragraph (18) or (19) of this section may be enjoined by any court of competent jurisdiction at the suit of the United States, the Commission, any commission or regulating body of the State or States affected, or any

party in interest; and any carrier which, or any director, officer, receiver, operating trustee, lessee, agent, or person, acting for or employed by such carrier, who knowingly authorizes, consents to, or permits any violation of the provisions of this paragraph or of paragraph (18) of this section, shall upon conviction thereof be punished by a fine of not more than $5,000 or by imprisonment for not more than three years, or both.

"(21) The Commission may, after hearing, in a proceeding upon complaint or upon its own initiative without complaint, authorize or require by order any carrier by railroad subject to this part, party to such proceeding, to provide itself with safe and adequate facilities for performing as a common carrier its car service as that term is used in this part, and to extend its line or lines: *Provided,* That no such authorization or order shall be made unless the Commission finds, as to such extension, that it is reasonably required in the interest of public convenience and necessity, or as to such extension or facilities that the expense involved therein will not impair the ability of the carrier to perform its duty to the public. Any carrier subject to this part which refuses or neglects to comply with any order of the Commission made in pursuance of this paragraph shall be liable to a penalty of $100 for each day during which such refusal or neglect continues, which shall accrue to the United States and may be recovered in a civil action brought by the United States.

"(22) The authority of the Commission conferred by paragraphs (18) to (21), both inclusive, shall not extend to the construc-

tion or abandonment of spur, industrial, team, switching or side tracks, located or to be located wholly within one State, or of street, suburban, or interurban electric railways, which are not operated as a part or parts of a general steam railroad system of transportation."

Section 5 of the Interstate Commerce Act, as amended September 18, 1940, reads, in part, as follows:

"SEC. 5. (1) Except upon specific approval by order of the Commission as in this section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part, part II, or part III to enter into any contract, agreement, or combination with any other such common carrier or carriers for the pooling or division of traffic, or of service, or of gross or net earnings, or of any portion thereof; and in any case of an unlawful agreement for the pooling or division of traffic, service, or earnings as aforesaid each day of its continuance shall be a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any such carrier or carriers or upon its own initiative, that the pooling or division, to the extent indicated by the Commission, of their traffic, service, or gross or net earnings, or of any portion thereof, will be in the interest of better service to the public or of economy in operation, and will not unduly restrain competition, the Commission shall by order approve and authorize, if assented to by all the carriers involved, such pooling or division, under such rules and regulations, and for such consideration

as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises: *Provided further,* That any contract, agreement, or combination to which any common carrier by water subject to part III is a party, relating to the pooling or division of traffic, service, or earnings, or any portion thereof, lawfully existing on the date this paragraph as amended takes effect, if filed with the Commission within six months after such date, shall continue to be lawful except to the extent that the Commission, after hearing upon application or upon its own initiative, may find and by order declare that such contract, agreement, or combination is not in the interest of better service to the public or of economy in operation, or that it will unduly restrain competition.

"(2) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b)—

"(i) for two or more carriers to consolidate or merge their properties or franchises, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through ownership of its stock or otherwise; or for a person which is not a carrier to acquire control of two or more carriers through ownership of their stock or otherwise; or for a person which is not a carrier and which has control of one or more carriers to

acquire control of another carrier through ownership of its stock or otherwise; or

"(ii) for a carrier by railroad to acquire trackage rights over, or joint ownership in or joint use of, any railroad line or lines owned or operated by any other such carrier, and terminals incidental thereto.

"(b) Whenever a transaction is proposed under subparagraph (a), the carrier or carriers or person seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants (and, in case carriers by motor vehicle are involved, the persons specified in section 205 (e), and shall afford reasonable opportunity for interested parties to be heard. If the Commission shall consider it necessary in order to determine whether the findings specified below may properly be made, it shall set said application for public hearing, and a public hearing shall be held in all cases where carriers by railroad are involved. If the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed transaction is within the scope of subparagraph (a) and will be consistent with the public interest, it shall enter an order approving and authorizing such transaction upon the terms and conditions, and with the modifications, so found to be just and reasonable: *Provided*, That if a carrier by railroad subject to this part, or any person which is controlled by such a carrier, or affiliated therewith within the meaning of

paragraph (6), is an applicant in the case of any such proposed transaction involving a motor carrier, the Commission shall not enter such an order unless it finds that the transaction proposed will be consistent with the public interest and will enable such carrier to use service by motor vehicle to public advantage in its operations and will not unduly restrain competition.

"(c) In passing upon any proposed transaction under the provisions of this paragraph (2), the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

"(d) The Commission shall have authority in the case of a proposed transaction under this paragraph (2) involving a railroad or railroads, as a prerequisite to its approval of the proposed transaction, to require, upon equitable terms, the inclusion of another railroad or other railroads in the territory involved, upon petition by such railroad or railroads requesting such inclusion, and upon a finding that such inclusion is consistent with the public interest.

"(e) No transaction which contemplates a guaranty or assumption of payment of dividends or of fixed charges, shall be approved by the Commission under this paragraph (2) except upon a specific finding by the Commission that such guaranty or as-

sumption is not inconsistent with the public interest. No transaction shall be approved under this paragraph (2) which will result in an increase of total fixed charges, except upon a specific finding by the Commission that such increase would not be contrary to public interest.

"(f) As a condition of its approval, under this paragraph (2), of any transaction involving a carrier or carriers by railroad subject to the provisions of this part, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order. Notwithstanding any other provisions of this Act, an agreement pertaining to the protection of the interests of said employees may hereafter be entered into by any carrier or carriers by railroad and the duly authorized representative or representatives of its or their employees."

Section 5 prior to the Transportation Act of 1940 read, in part, as follows:

"(1) That, except upon specific approval by order of the Commission as in this

section provided, and except as provided in paragraph (16) of section 1 of this part, it shall be unlawful for any common carrier subject to this part to enter into any contract, agreement, or combination with any other common carrier or carriers for the pooling of freights of different and competing railroads, or to divide between them the aggregate or net proceeds of the earnings of such railroads, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid each day of its continuance shall be deemed a separate offense: *Provided,* That whenever the Commission is of opinion, after hearing upon application of any carrier or carriers engaged in the transportation of passengers or property subject to this part, or upon its own initiative, that the division of their traffic or earnings, to the extent indicated by the Commission, will be in the interest of better service to the public, or economy in operation, and will not unduly restrain competition, the Commission shall have authority by order to approve and authorize, if assented to by all the carriers involved, such division of traffic or earnings, under such rules and regulations, and for such consideration as between such carriers and upon such terms and conditions, as shall be found by the Commission to be just and reasonable in the premises.

(2) The Commission shall as soon as practicable prepare and adopt a plan for the consolidation of the railway properties of the continental United States into a limited number of systems. In the division of such railways into such systems under such plan, competition shall be preserved as fully as possible and wherever practi-

cable the existing routes and channels of trade and commerce shall be maintained. Subject to the foregoing requirements, the several systems shall be so arranged that the cost of transportation as between competitive systems and as related to the values of the properties through which the service is rendered shall be the same, so far as practicable, so that these systems can employ uniform rates in the movement of competitive traffic and under efficient management earn substantially the same rate of return upon the value of their respective railway properties.

(3) When the Commission has agreed upon a tentative plan, it shall give the same due publicity and upon reasonable notice, including notice to the Governor of each State, shall hear all persons who may file or present objections thereto. The Commission is authorized to prescribe a procedure for such hearings and to fix a time for bringing them to a close. After the hearings are at an end, the Commission shall adopt a plan for such consolidation and publish the same; but it may at any time thereafter, upon its own motion or upon application, reopen the subject for such changes or modifications as in its judgment will promote the public interest.

(4) (a) It shall be lawful, with the approval and authorization of the Commission, as provided in subdivision (b), for two or more carriers to consolidate or merge their properties, or any part thereof, into one corporation for the ownership, management, and operation of the properties theretofore in separate ownership; or for any carrier, or two or more carriers jointly, to purchase, lease, or contract to

operate the properties, or any part thereof, of another; or for any carrier, or two or more carriers jointly, to acquire control of another through purchase of its stock; or for a corporation which is not a carrier to acquire control of two or more carriers through ownership of their stock; or for a corporation which is not a carrier and which has control of one or more carriers to acquire control of another carrier through ownership of its stock.

"(b) Whenever a consolidation, merger, purchase, lease, operating contract, or acquisition of control is proposed under subdivision (a), the carrier or carriers or corporation seeking authority therefor shall present an application to the Commission, and thereupon the Commission shall notify the Governor of each State in which any part of the properties of the carriers involved in the proposed transaction is situated, and also such carriers and the applicant or applicants, of the time and place for a public hearing. If after such hearing the Commission finds that, subject to such terms and conditions and such modifications as it shall find to be just and reasonable, the proposed consolidation, merger, purchase, lease, operating contract, or acquisition of control will be in harmony with and in furtherance of the plan for the consolidation of railway properties established pursuant to paragraph (3), and will promote the public interest, it may enter an order approving and authorizing such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon the terms and conditions and with the modifications so found to be just and reasonable."

APPENDIX B

Table of abandoned mileage

Summary of all abandonment applications between 1920 and 1934 as contained in the Commission's 48th Annual Report dated December 1, 1934, p. 20:

Year ended October 31	Number of certificates issued permitting abandonment	Miles permitted to be abandoned	Year ended October 31	Number of certificates issued permitting abandonment	Miles permitted to be abandoned
1920			1929	48	539.53
1921	31	701.93	1930	72	[1] 1,807.46
1922	30	526.53	1931	80	1,019.31
1923	19	523.41	1932	90	1,418.27
1924	30	453.83	1933	429	2,404.26
1925	46	651.97	1934	154	2,514.22
1926	49	592.56			
1927	52	830.61	Total	900	[1] 14,570.94
1928	61	587.05			

[1] Includes 881.65 miles of which the Delaware & Hudson Co. was permitted to abandon operation and which was acquired and operated by the Delaware & Hudson Railroad Corporation, a new company.

Subsequent annual reports bring this information up to date as follows:

Year ended October 31	Number of certificates issued permitting abandonment	Miles permitted to be abandoned	Annual report
1935	100	1,691.82	49th (pp. 147–149).
1936	116	1,902.99	50th (pp. 152–154).
1937	116	1,547.37	51st (pp. 157–159).
1938	123	2,014.05	52d (pp. 166–168).
1939	106	2,537.79	53d (pp. 182–184).
1940	124	1,919.40	54th (p. 51).
1941	111	1,938.00	55th (Unprinted).
Total	796	13,151.42	
Grand total 1920–1941	1,696	27,722.36	

APPENDIX C

Chronology of S. 2009

September 20, 1938—Committee of Six appointed by the President.

December 23, 1938—Report of Committee of Six submitted to the President.

January 13, 1939—H. R. 2531 introduced in House by Chairman Lea.

March 8, 1939—H. R. 4862 (Committee of Six Bill) introduced in House by Chairman Lea.

January 24–March 30, 1939—Hearings before House Committee on H. R. 2531 and H. R. 4862.

March 30, 1939—S. 2009 introduced in Senate by Senators Wheeler and Truman.

April 3–14, 1939—Hearings on S. 2009 before Senate Committee on Interstate Commerce.

May 12, 1939—S. 2009, as agreed to by full Senate Committee, printed.

May 16, 1939—S. 2009 reported to Senate with amendments.

May 22–25, 1939—S. 2009 debated in Senate.

May 25, 1939—S. 2009 passed the Senate.

May 29, 1939—S. 2009, as passed by the Senate, referred to House Committee on Interstate and Foreign Commerce.

July 18, 1939—S. 2009 reported by House Committee, with amendments.

July 21–26, 1939—S. 2009, as reported out by House Committee, debated in House of Representatives.

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July 26, 1939—S. 2009 passed the House of Representatives, with amendments.

July 29, 1939—S. 2009 sent to conference.

January 29, 1940—Letter from Legislative Committee of the Interstate Commerce Commission transmitting report on S. 2009 as passed by both Houses.

April 26, 1940—Conference Committee reported bill to their respective Houses.

April 26, 1940—H. R. 9563 introduced by Congressman Harrington.

May 9, 1940—Bill recommitted by House.

August 7, 1940—Bill again reported out by Committee of Conference.

August 12, 1940—Conference report adopted in House.

August 30–September 9, 1940—Conference report debated in Senate.

September 9, 1940—Conference report agreed to by Senate.

September 18, 1940—Bill signed by President.